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**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Order Instituting Investigation And Order to  
Show Cause on the Commission's Own Motion  
into the Operations and Practices of Pacific Gas  
and Electric Company with Respect to Facilities  
Records for its Natural Gas Distribution System  
Pipelines.

I.14-11-008  
(Filed November 20, 2014)

**PACIFIC GAS AND ELECTRIC COMPANY'S  
SUPPLEMENTAL REPLY IN SUPPORT OF ITS MOTION TO COMPEL  
DISCOVERY FROM INTERVENOR  
THE CITY OF CARMEL-BY-THE-SEA**

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Attorneys for  
PACIFIC GAS AND ELECTRIC COMPANY

Dated: January 19, 2016

**SUPPLEMENTAL REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY  
FROM CARMEL**

Pacific Gas and Electric Company (“PG&E”) respectfully submits this supplemental reply in support of its Motion to Compel Discovery from Intervenor Carmel-by-the-Sea (“Carmel”). Pursuant to Rule 11.3(f) of the Commission’s Rules of Practice and Procedure, the Honorable ALJ Maribeth Bushey authorized this submission via an email to the parties on January 17, 2016.

**I. ARGUMENT**

For weeks, Carmel has refused to provide PG&E with facts related to allegations made for the first time in its data requests, arguing that any facts learned during its investigation are protected attorney work product. This weekend, two days before the start of hearings, Carmel publicized these same allegations, and more, in the *San Francisco Chronicle*. The article, headlined “Carmel fears PG&E tampered with records in 2014 blast,” features interviews with Carmel’s counsel Britt Strottman as well as Carmel’s mayor, and makes the new allegation that former PG&E employee Leslie Banach McNiece was fired because she refused to help PG&E managers gain access to records related to the work in Carmel.<sup>1</sup> Carmel’s mayor also suggests that Ms. McNiece’s employment might have been terminated for refusing to “go along” with “some sort of cover-up.”<sup>2</sup>

Carmel’s attempt to try its case in the media, while simultaneously refusing to produce relevant information in this proceeding, makes clear that Carmel is misusing the Commission’s proceedings, and that PG&E’s suggested alternative ruling on the motion to compel—precluding

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<sup>1</sup> Supplemental Declaration of Marie L. Fiala in Support of PG&E’s Motion to Compel (“Supp. Fiala Decl.”) at Ex. T.

<sup>2</sup> *Id.* As the article also reports, PG&E had conducted a diligent investigation into these allegations and had identified no evidence that would support them. Ex. T; *see also* December 31, 2015 Declaration of Marie. L. Fiala in Support of Motion to Compel, ¶ 4 and Ex. C at Responses 13–23, 29.

Carmel from proffering any evidence at the hearing that relates to this subject matter—is particularly appropriate.

In opposing PG&E’s motion to compel, Carmel had claimed that the facts it learned in its interview with Ms. McNiece were “within the sweet spot of absolutely privileged information.”<sup>3</sup> These assertions were without merit when they were made, as PG&E has explained, but they are particularly baseless now that this information has been distributed to thousands of *Chronicle* readers, thus waiving any privilege that might have applied. As the California Court of Appeal held in a closely analogous case, a litigant cannot use protected information as a sword with the public and a shield in the courtroom. *City of Los Angeles v. Superior Court*, 170 Cal. App. 3d 744, 755 (1985).

In *City of Los Angeles v. Superior Court*, the City Attorney told the *Los Angeles Times* that his office had investigated a possible criminal action against a property owner for violation of a city ordinance and concluded that there was an insufficient basis to bring charges. *Id.* at 748–49. The City Attorney nevertheless initiated a related civil action against the property owner, who sought discovery into the details of the abandoned criminal investigation. *Id.* at 749–50. The trial court ruled that the City Attorney waived both the attorney-client privilege and qualified work product protection with respect to the investigation when he discussed it with the *LA Times*. *Id.* at 754–55.

According to the trial court, “when the head of an executive agency” chooses “not only to mention [the investigation], but explain what [his] office was doing and why,” it is “pretty hard in that circumstance to argue that there was no waiver.” *Id.* at 755. The Court of Appeal agreed, holding that the City Attorney could not have it both ways:

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<sup>3</sup> Carmel Opp. at 5.

The court recognized the injustice inherent in the City's apparent contention that the information in question was privileged for purposes of this litigation, but not privileged for purposes of a publicity campaign to the million or so readers of the Los Angeles Times. *The city attorney assumed the risks inherent in trying one's case in the media.*

*Id.* at 755 (emphasis added).

The same is true here. When Carmel's mayor (the "head of [its] executive agency") and its attorney chose to use the facts from their supposedly confidential investigation in a publicity campaign, they waived any right Carmel might have had to protect the underlying work product—just as the City Attorney in *City of Los Angeles* did. *Id.* at 748. Carmel also fatally undermined its assertion of the official information privilege, which had been based on its claim that "[t]he information from the Banach interview was obtained in confidence and has not been publicly disclosed."<sup>4</sup> If this was ever true, it no longer is.

## **II. CONCLUSION**

Accordingly, even if Carmel's invocation of the attorney work product doctrine or official information privilege had any merit before, Carmel has waived them now. For this additional reason, PG&E respectfully requests that Your Honor either direct Carmel to immediately provide the requested discovery<sup>5</sup> or preclude Carmel from seeking to introduce evidence going to any of the related allegations in this proceeding.

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<sup>4</sup> Carmel Opp. At 9.

<sup>5</sup> Specifically, PG&E moved to compel responses to Questions 13 through 23 in PG&E's third set of data requests to Carmel.

Respectfully submitted,

*/s/ Elizabeth Collier*

*/s/ Marie L. Fiala*

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Dated: January 19, 2016

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Order Instituting Investigation And Order to Show Cause on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company with Respect to Facilities Records for its Natural Gas Distribution System Pipelines.

I.14-11-008  
(Filed November 20, 2014)

**SUPPLEMENTAL DECLARATION OF MARIE L. FIALA IN SUPPORT  
OF PACIFIC GAS AND ELECTRIC COMPANY'S MOTION TO COMPEL**

I, Marie L. Fiala, declare:

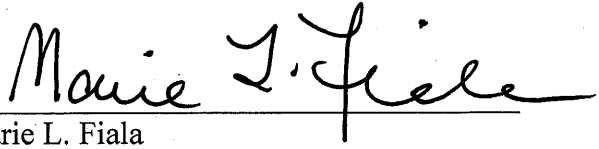
1. I am a partner in the law firm of Sidley Austin LLP, counsel of record for Pacific Gas & Electric Company ("PG&E") in this proceeding. I make this declaration in support of PG&E's motion to compel discovery responses from Intervenor Carmel-by-the-Sea ("Carmel"). I have personal knowledge of the following facts, except for those stated on information and belief and, as to those matters, I believe them to be true.

2. On January 16, the *San Francisco Chronicle* published an article with the headline "Carmel fears PG&E tampered with records in 2014 blast," which reports on allegations that former PG&E employee Leslie Banach was fired because she refused to help PG&E managers gain access to records related to the work in Carmel. The article quotes Ms. Strottman and Carmel's mayor on issues that are the subject of this Motion, and as to which Carmel has claimed work product protection. A true and correct copy of the article is attached as **Exhibit T**.

3. I wrote an email to ALJ Maribeth Bushey on January 17, with service on the service list in this proceeding, requesting permission to submit a supplemental reply to address

the new issues raised by Carmel's media interview. ALJ Bushey responded later that day, granting PG&E permission to file a supplemental reply no later than 3:00 pm on January 19.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and belief. Executed on January 18, 2016, in San Francisco, California.

  
Marie L. Fiala

## **EXHIBIT T**



**SFGATE**<http://www.sfgate.com/news/article/Carmel-fears-PG-E-tampered-with-records-in-2014-6764498.php>

# Carmel fears PG&E tampered with records in 2014 blast

By **Jaxon Van Derbeken** Updated 7:10 am, Sunday, January 17, 2016



**IMAGE 1 OF 10**

A house at Guadalupe and 3rd in Carmel after a gas explosion on March 3, 2014.

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A former Pacific Gas and Electric Co. official — now a whistle-blower in the federal prosecution of the company stemming from the San Bruno explosion — says she lost her job soon after she refused to help PG&E managers secretly gain

access to records in a separate explosion, The Chronicle has learned.

Attorneys for the city of Carmel, where botched work on a gas line touched off an explosion that destroyed a vacant cottage in 2014, said the former official's accusation suggests that PG&E may have been trying to tamper with documents showing the utility was to blame for the blast.

"If this is all true, PG&E has more problems than just record keeping," said Britt Strottman, one of the attorneys the city hired to argue to state regulators that PG&E should be punished for keeping sloppy paperwork about the Carmel pipe and other lines in its gas system.

PG&E denied any wrongdoing, saying it has conducted an extensive investigation and found no evidence to support the former manager's accusations.

## **Records problems**

Carmel officials' suspicions about PG&E were raised when attorneys and the city's police chief interviewed Leslie Banach McNiece, 57, whom the company hired in 2010 to help clean up extensive record-keeping problems with its gas system. Investigators discovered the problems while looking into the PG&E transmission pipeline blast in September 2010 that killed eight people and destroyed 38 homes in San Bruno.

Federal prosecutors have accused PG&E of violating pipeline safety rules and obstructing the National Transportation Safety Board's probe of the blast. They say McNiece will testify that **company managers told her to destroy documents** and that she found crucial records of the San Bruno pipeline in a trash bin outside a PG&E office.

McNiece was still working for PG&E on March 3, 2014, when crews doing replacement work on a gas distribution line triggered the Carmel explosion that left a cottage in ruins.

## **Plastic inside steel**

Just as in San Bruno, the Carmel blast was largely traceable to **gaps in records about**

the pipeline.

The Carmel explosion happened as crews were replacing a street distribution gas line a smaller pipe than the type that ruptured in San Bruno. The replacement line was supposed to be hooked up to a separate pipeline, which PG&E records showed was made of steel.

However, sometime after 1997, PG&E or a contractor had inserted a plastic pipe inside the steel one. In doing so, workers made slices in the steel line, rendering it useless for carrying natural gas. No one marked the changes on PG&E's pipeline maps.

In 2014, workers relying on the inaccurate documents drilled into the old steel main and pierced the plastic line inside, unaware it was there. Gas then flowed out of the plastic line and into the surrounding steel line.

The gas escaped through a cut in the steel pipe and eventually got into the cottage at

Third Avenue and Guadalupe Street. A pilot light apparently touched off the explosion that leveled the cottage and damaged three nearby homes. No one was injured.

In filings with the California Public Utilities Commission, attorneys for Carmel said they interviewed McNiece about the blast in October.

After PG&E hired her, McNiece said, she implemented a system that would electronically track when a company employee accessed pipeline records, according to the attorneys.

### **Avoiding tracking**

A few days after the Carmel explosion, two PG&E records department employees asked McNiece to retrieve records about the pipeline in a way that could not be tracked by her new system, attorneys for the city say in the regulatory filings.

Her instructions were “that the Carmel records not be tracked by your internal electronic tracking system,” the attorneys said in written questions to PG&E that are part of the regulatory case against the company. “In other words ... the requesters wanted no tracking of checking out the Carmel job file.”

McNiece “objected to the request without tracking the file, but she was instructed to do it anyway,” the Carmel attorneys said in the filings.

### **‘A mystery’**

In its questions to PG&E, the city suggests that the purpose was to tamper with the records without leaving a trace.

“The chain of events is still a mystery to us,” said Strottman, the attorney for Carmel. “We have no idea why PG&E would not want to have an audit trail, but it raises unanswered questions as to why this would happen.”

In the end, McNiece was ordered to turn the Carmel file over to “corporate,” the Carmel attorneys wrote. Several days later, she was told she would be laid off, the city said.

McNiece left PG&E in July 2014 and now works for a New York-based software consultant, according to her LinkedIn page. She lives in Westport, Conn., and could not be reached for comment.

In its response to Carmel, PG&E said it had searched its e-mails and other records and had been unable to find any support for McNiece's story.

"PG&E has diligently investigated Carmel's allegations — interviewing numerous employees, including the two employees named in Carmel's data requests, and extensively reviewing records — and found no evidence supporting them," the company said in a recent filing with the California Public Utilities Commission.

PG&E also insists that the records at issue were kept in an earlier system, not the new tracking system that McNiece said she was asked to circumvent.

That older system, according to PG&E, made no record when employees tried to access a pipeline document. Any documents related to the Carmel case were retrieved out of that untraceable system, the company said.

## **Safety changes**

In a statement, PG&E said it has made several record-keeping improvements, such as digitizing pipeline service records and centralizing access to databases for its transmission and distribution pipelines.

In addition, PG&E spokesman Greg Snapper said in the statement, "It's important for our customers to know that we have a company-wide practice that requires any employee or contractor to stop a job if the records do not match what is found in the ground or if the employee believes the situation is not safe."

## **Hearing on Carmel blast**

The Public Utilities Commission has already levied a \$10.8 million fine against PG&E for the Carmel explosion related to the company's emergency response. On Tuesday, is scheduled to hold a hearing to determine whether the company should be penalized for record-keeping problems on the gas distribution system in Carmel and elsewhere.

Carmel Mayor Jason Burnett said he hopes the state will look into whether there was “some sort of cover-up. Did PG&E not come clean with what happened, and finally, was someone fired because they wouldn’t go along with the cover-up?”

“Those are the central questions,” Burnett said. “That’s what we need to get to the bottom of.”

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